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274261—40

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 512

KONG DIN QUONG, PETITIONER

v.

EDWARD L. HAFF, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE PORT OF SAN FRANCISCO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the District Court of the United States for the Northern District of California. The opinion of the Circuit Court of Appeals (R. 30–44) is reported in 112 F. (2d) 96.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 21, 1940 (R. 45). A petition for rehearing was denied July 25, 1940 (R. 46).

The petition for writ of certiorari was filed on October 17, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the evidence to sustain the decision of the immigration authorities is so deficient as to render the decision arbitrary or the hearing unfair.

STATEMENT

Petitioner on November 9, 1938, applied at the Port of San Francisco for admission to the United States under a citizenship status claiming to have been born in China on December 29, 1921 (IR 10–11 [1]).

Kong Ngok Wah, petitioner's father and a citizen, was admitted to the United States on May 11, 1921 (IR 48). Petitioner was excluded from admission by a Board of Special Inquiry convening December 9 and 10, 1938, pursuant to the pro-

[1] This refers to the "Immigration Record," a typewritten record, on file in this Court, of the hearings and proceedings had before the immigration authorities which was annexed to and made a part of the return to the petition for writ of habeas corpus (R. 11). The original record is bound and includes the exhibits, some of which are not identified as such, interspersed with the transcript of the testimony. Therefore to facilitate the use of the Immigration Record, all of the pages, including the exhibits and decisions, have been consecutively numbered in the lower right-hand corner and these are the pages referred to.

visions of 8 U. S. C., Sec. 153 (IR 50–51), and upon appeal, after a hearing before the Board of Review, the Secretary of Labor on March 16, 1939, affirmed the holding (IR 71, 73). This decision was based on a ruling that the petitioner was older than his alleged age of 17 years less two weeks at the time of the hearing by the Board of Special Inquiry and was in fact not a citizen of the United States, in that he was born prior to the time his father was first admitted to this country. Thereafter petition for a writ of habeas corpus was filed in the Southern Division of the United States District Court for the Northern District of California; the petition was denied (R. 12). On appeal, the order was affirmed by the Circuit Court of Appeals for the Ninth Circuit, with one judge dissenting (R. 30–44).

The evidence for petitioner tending to show that he is the son of his alleged father and was born subsequent to the latter's entry into the United States is as follows:

(1) When petitioner's father first arrived at San Francisco, on April 28, 1921, for admission to the United States, he claimed to have one son, Kong Yee Gwong, age two (IR 48). In 1925 the father, contemplating a return to China, stated that he had two sons, Kong Yee Gwong, age six, and Kong Din Gwong (Kong Din Quong), which is the name of petitioner, age five (IR 48). On the return of the father to the United States, two years later, he

claimed to have three sons and gave as the birthday of the second son, Kong Din Gwong (Kong Din Quong), the Chinese equivalent of December 29, 1921 (IR 48–49). According to that date of birth, petitioner would have been 17 years of age less two weeks when examined by the Board of Special Inquiry.[2]

(2) At the hearing conducted by the Board of Special Inquiry, the petitioner (IR 11–12), the petitioner's alleged father (IR 1, 23), and the petitioner's alleged aunt (IR 4, 31) testified as to petitioner's age and parentage. Their statements were consistent and precise and in agreement with the contentions of the petitioner and the statements previously made by the alleged father.

(3) Dr. David Divanovich, a physician in private practice, stated, upon a survey of X-ray plates taken by the Government doctors and a physical examination of the petitioner, that the petitioner "is about 18 years of age" (IR 45).

(4) The uncontradicted evidence indicates that the father of petitioner was born September 11, 1902, and that his mother is one year younger, and that they were married in September 1919 (IR 22, 23). According to these dates, the parents would not have a son as old as the maximum ages given

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[2] The apparent discrepancy between the date of birth and the age of the child as stated by the father is explained by the fact that by Chinese reckoning years of age are computed from the date of birth rather than from the first birthday (R. 44).

by doctors who testified for the Government. (See R. 41).

The evidence opposed to petitioner's contention was:

(1) The report of the Chief Medical Officer of the Immigration Hospital, Angel Island, California, stated the opinion that the petitioner was between 21 and 23 years of age. This was based on a complete physical examination, an X-ray report of the Government roentgenologist, and a dental report submitted by a dental surgeon of the United States Marine Hospital. Such items were considered as facial expression, physique, skin condition, development of permanent wrinkles, skin covering of the knees and elbows, hair, development of sexual organs, fusion of bones which make up the knees and elbows, and condition of teeth (IR 39–40).

(2) The members of the Board of Special Inquiry were all of the opinion, judging from his appearance, demeanor, and timber of his voice, that petitioner was older than his alleged age—the average opinion being 19 years of age (IR 21–22, 34).

(3) There were certain inconsistencies in the testimony of the applicant and his witnesses. In particular the Board noted that the applicant frequently confused his mother with his paternal grandmother and was unable to explain this confusion. In addition, when asked to describe his oldest brother, the applicant said: "Did you mean the second one." Then he seemed to "wake up"

and gave the name of the first one, together with the rest of his brothers along the line (IR 12).

In the unanimous report of the Board of Special Inquiry, Chairman Borstadt remarked (IR 50)—

> This testimony of the applicant is unsatisfactory and shows, in my opinion, that he is not testifying to facts or he would have no difficulty in keeping such important matters straight.
>
> I am of the opinion that the applicant and his witnesses are seriously discredited and that the relationship claimed and the possible admissibility of the applicant as a citizen due to his age are not satisfactorily established.

ARGUMENT

Petitioner asserts (1) that the decision of the Board of Special Inquiry, affirmed by the Board of Review of the Secretary of Labor, was arbitrary and unfair in that it was not predicated upon sufficient evidence, and (2) that, with the divided opinion in the Circuit Court of Appeals, the majority opinion below gives rise to a conflict of decisions (Pet. 4–5).

Petitioner's claim of citizenship is based on R. S., Sec. 1993, as amended (8 U. S. C., Sec. 6), which provides:

> Any child hereafter born out of the limits and jurisdiction of the United States whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the

> United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. * * *

Section 23 of the Act of May 26, 1924 (8 U. S. C., Sec. 221) provides:

> Whenever any alien attempts to enter the United States the burden of proof shall be upon such alien to establish that he is not subject to exclusion under any provision of the immigration laws; * * *

Since the relationship between the applicant and his alleged father, who is a citizen of the United States, is not in dispute (IR 72), the only issue is whether the applicant sustained the burden of proving that he was born after his father entered the United States in May 1921. If so, he was entitled to entry under R. S., Section 1993. See *Weedin* v. *Chin Bow,* 274 U. S. 657.

There was a direct conflict of evidence as to the applicant's age. The Board was doubtful of the credibility of the applicant and his witnesses, and after personal inspection of the applicant (*United States* v. *Day,* 54 F. (2d) 990, 991 (C. C. A. 2d)), resolved that conflict against him. The applicant was given a full hearing and opportunity to establish his case (IR 9, 11, 41, 47, 53, 55). If a fair hearing has been had and if the decision of the administrative department finds support in the evidence,[3]

[3] It seems unnecessary to determine whether the decision must be supported by "substantial evidence" or merely "some evidence" because the expert opinion of the govern-

that decision is conclusive and not subject to review in the courts on habeas corpus proceedings. *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 358; *Chin Yow* v. *United States*, 208 U. S. 8, 13. The decision in this case obviously has support in the evidence, as the courts below have held. It is the duty of the administrative board to pass upon the weight of the evidence and the credibility of the witnesses, and its decision in these matters is not subject to review. *Tisi* v. *Tod*, 264 U. S. 131, 133; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457–458; *Woon Sun Seung* v. *Proctor*, 99 F. (2d) 285 (C. C. A. 9th); *Wong Choy* v. *Haff*, 83 F. (2d) 983 (C. C. A. 9th). While the administrative decision does not seem to us to be supported by the weight of the evidence, it is plain that there was considerable evidence to support its finding that the petitioner had not carried his burden of proof, and that its decision was neither arbitrary nor unfair.

2. Petitioner's second ground for granting the writ of certiorari is that the majority opinion below makes for a conflict of decisions. He has cited the

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mental medical authorities based on scientific data seems evidently to be "substantial" evidence. However, the decisions of this Court indicate that decisions of the Secretary of Labor will be upheld if supported by "evidence" (*Kessler* v. *Strecker*, 307 U. S. 22, 34), by "any evidence" (*Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 342), or by "some evidence" (*Vajtauer* v. *Commissioner*, 273 U. S. 103, 106). In *Kwock Jan Fat* v. *White*, 253 U. S. 454, 458, the Court stated that the decision must find "adequate" support in the evidence.

cases *of Woo Hoo* v. *White,* 243 Fed. 541 (C. C. A. 9th), and *Lew Git Cheung* v. *Nagle,* 36 F. (2d) 452 C. C. A. 9th) (Br. 16). The *Woo Hoo* case held (p. 543) with regard to the certificate of a doctor based on appearance and not on scientific data, that "the opinion of a surgeon is believed to be of no greater value than that of a layman, and in either case it has but little probative value to show a difference of age of only two years." The court below pointed out in the *Lew Git Cheung* case (p. 453) that the age of a child is much more susceptible to accurate estimate than that of an adult and continued that estimate of age may have very substantial weight if a discrepancy of several years is involved "whereas, if the discrepancy is only slight, the estimate would have but little value." Nevertheless, in that case, the majority opinion concluded, after reviewing the scientific basis for the doctor's certificates (p. 453):

> the record exhibits a substantial conflict; and, aided by their own impressions, based upon the appellant's appearance, the administrative officers cannot be said to have acted arbitrarily or unreasonably in the conclusion they reached.

The facts in the case at bar are very similar to those in the recent case of *Hom Ark* v. *Carr,* 105 F. (2d) 607 (C. C. A. 9th) in which the court was of the unanimous opinion that the conclusion of the members of the Immigration Board as to the age of the applicant, supplemented by scientific medi-

cal estimates, was sufficient to support the decision of the Board. See also *Weedin* v. *Yeung Bon Lip*, 43 F. (2d) 465 (C. C. A. 9th), *Fong Lim* v. *Nagle*, 2 F. (2d) 971 (C. C. A. 9th). Particularly since issues of this nature must turn largely upon the facts of a particular record, there is no substantial conflict of decisions within the Ninth Circuit and, of course, no conflict between different circuits.

CONCLUSION

The case was correctly decided by the courts below and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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NOVEMBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940